No. 2023

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, Partners doing business as MEYER, WILSON & COMPANY,

PLAINTIFFS IN ERROR

vs.

EVERETT PULP & PAPER COMPANY,

DEFENDANT IN ERROR

Brief on Behalf of Plaintiffs in Error

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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Plaintiffs in Error,

v.

EVERETT PULP & PAPER COMPANY,

Defendant in Error.

Brief on Behalf of Plaintiffs in Error

STATEMENT OF CASE

In making a statement of this case the appellant will set forth the pleadings upon which the issues were tried as comprising a clearer and more concise statement than could be made otherwise.

On the 20th day of January, 1908, the above named plaintiffs filed a complaint in the Circuit Court of the United States for the Western District of Washington, Northern Division, which is in words and figures as follows, to-wit:

(TITLE.)

The above named plaintiffs, for cause of action against the above named defendant, allege as follows:

I.

"At all the times hereinafter set forth the plaintiffs, "H. L. E. Meyer, George H. C. Meyer and H. L. E. Meyer, "Jr., were and still are citizens of the State of California, "and residents and inhabitants thereof; and plaintiffs, "John Wedderburn Wilson and John M. Quaile, were and "still are subjects of His Majesty, the King of Great "Britain and Ireland, and were and still are citizens of the "Kingdom of Great Britain and Ireland and residents and "inhabitants thereof; and all of the plaintiffs were and "still are partners doing business as Meyer, Wilson & "Company.

II.

"At all the times hereinafter set forth the defendants, "Everett Pulp & Paper Company, was and still is a corpo- "ration organized and existing under and by virtue of the "laws of the State of Washington, and at all of such times "said defendant was and still is a citizen of the State of "Washington and a resident and inhabitant thereof.

III.

"The amount in controversy herein, exclusive of inter- "est and costs, exceeds the sum of two thousand dollars "($2,000), and is, to-wit, the sum of six thousand two "hundred and seventy-two dollars.

IV.

"Heretofore, and on the 15th day of October, 1906, "plaintiffs and defendants entered into a certain contract "in writing wherein and whereby the plaintiffs agreed to "sell to the defendant, and the defendant agreed to pur-

"chase from the plaintiffs about three hundred (300) to "four hundred (400) tons of twenty-two hundred and "forty (2240) pounds each of China clay in casks, of the "brand known as the P. X. Y. brand, at the rate of seventy "(70) cents per one hundred (100) pounds, net invoice "weight, ex ship at Seattle, Washington.

"Such sale was made for shipment per the ship Mozam- "bique from Leith, Scotland, or Tyne, England, to Seattle. "Delivery was to be taken by the purchaser from along- "side the vessel at once on discharge at Seattle, Washing- "ton; such clay to be at the risk of purchasers, and wharf- "age, if any, at Seattle, Washington, to be for the account "of the purchaser.

"Pursuant to said contract, the plaintiffs delivered on "board the said ship Mozambique at Newcastle-on-the- "Tyne, England, sixteen hundred (1600) casks of China "clay of the P. X. Y. brand, the gross weight of which was "four hundred and twenty-five tons, containing nine hun- "dred and fifty-two thousand (952,000) pounds, and the "tare on which barrels was twenty-five tons, containing "fifty-six thousand (56,000) pounds, making the total net "weight four hundred (400) tons, containing eight hun- "dred and ninety-six thousand (896,000) pounds; all as "shown by the invoice weights thereof as paid for by plain- "tiffs to the sellers to them of such clay.

"Thereafter said ship Mozambique sailed upon her voy- "age from Newcastle-on-the-Tyne to Seattle, and there- "after, and prior to the 12th day of October, 1907, dis- "charged at the dock of Galbraith-Bacon Company at "Seattle, Washington, said China clay so shipped as afore- "said; and the defendant, pursuant to said contract, took "delivery of said clay from alongside said ship and ex said "ship at Seattle, Washington.

"The contract price for said clay, so sold and delivered "by plaintiffs to defendant, was the sum of sixty-two hun- "dred and seventy-two dollars ($6272), no part of which "has been paid, although long past due and payable. The

"terms of said sale were cash ex ship at Seattle, demand "has been made by plaintiffs upon the defendant for the "payment of said amount, but it refuses to pay the same "or any part thereof.

"Wherefore, plaintiffs demand judgment against the "defendant for the sum of sixty-two hundred and seventy-"two dollars ($6272) with interest thereon from the 12th "day of October, 1907, at the rate of six per cent per "annum, and for their costs and disbursements herein."

Thereafter, on February 15, 1908, the above named defendant filed its answer, which is in words and figures as follows, to-wit:

(TITLE.)

"Comes now the above named defendant, and answer-"ing the complain herein says:

I.

"This defendant has not sufficient knowledge or infor-"mation to form a belief as to the truth of the allegations "of the first paragraph of the complaint, and therefore "denies each and every allegation thereof.

II.

"This defendant admits the allegations of the second "paragraph of the complaint, and alleges that it has paid "its annual license fee due to the State of Washington.

III.

"This defendant admits that the amount in controversy "herein exceeds the sum of two thousand dollars "($2000.00), but denies that it equals the sum of six thou-"sand two hundred seventy-two dollars ($6272.00).

IV.

"Referring to the fourth paragraph of the complaint, "this defendant denies that said contract was entered into "on the 15th day of October, 1906, and alleges that said "contract was entered into on the 11th day of October, "1906, and confirmed on the 15th day of October, 1906. "This defendant denies that the plaintiffs delivered or dis- "charged at the dock of Galbraith-Bacon & Company at "Seattle Washington, sixteen hundred (1600) casks of "China clay of the P. X. Y. brand, and denies that the "China clay of the said brand so delivered at the said "wharf contained eight hundred and ninety-six thousand "(896,000) pounds, and denies that this defendant took "delivery of said clay from alongside said ship and ex "said ship at Seattle, Washington.

V.

"This defendant denies that the clay so sold and deliv- "ered by the plaintiffs to defendant was of the contract "price of sixty-two hundred and seventy-two ($6272.00) "dollars or any sum in excess of three thousand three hun- "dred and seventy-five and 12-100 ($3375.12) dollars.

"And further answering the complaint, and by way of "an affirmative defense, this defendant alleges:

I.

"That on or about the 11th day of October, this defend- "ant ordered of the plaintiffs from three hundred (300) "to four hundred (400) tons of P. X. Y. China clay, to be "fully equal to sample which had been theretofore submit- "ted by the plaintiffs to the defendant at the contract price "of seventy ($0.70) cents per one hundred (100) pounds, "ex ship at Seattle, Washington, duty paid. Said order "was accepted by the plaintiffs on or about the 15th day of "October, 1906, and thereafter the defendant in the month "of October, 1907, delivered on the wharf of Galbraith-

"Bacon & Company at Seattle, Washington, sixteen hun-
"dred (1600) casks of alleged China clay. It is not custom-
"ary in the clay trade to inspect casks on board the dock
"in Seattle, because of the expense and inconvenience, and
"pursuant to the custom existing in the trade, the said
"clay was forwarded to the factory or plant of the defend-
"ant at Everett, Washington, where upon an inspection it
"was found that of the said clay eight hundred and sixty-
"one (861) casks conformed to sample submitted of P. X.
"Y. brand, and that seven hundred and thirty-nine (739)
"casks were of an entirely different brand, the markings
"of which were almost identical with the good brand and
"not easily distinguishable therefrom, and that said differ-
"ent brand of seven hundred and thirty-nine (739) casks
"was far inferior to the sample submitted by the plaintiffs,
"and upon which the contract was based.

II.

"Immediately on the discovery that there was included
"in the said shipment of clay casks of said different brand,
"and of the inferior quality, this defendant notified the
"plaintiffs thereof and refused to accept the shipment.

III.

"At the time the defendant discovered that the plain-
"tiffs had included in the shipment clay of a grade inferior
"to sample, there were still remaining on the dock of Gal-
"braith-Bacon & Company at Seattle, Washington, two
"hundred and fifty-three (253) casks. This defendant
"promptly notified the plaintiffs that the shipment was
"not in accordance with sample, and after some correspond-
"ence it was agreed between the parties that the defend-
"ant should take to its plant at Everett the remaining two
"hundred and fifty-three (253) casks without admission
"of liability for the shipment and without expense to it
"if defendant's claim as to the inferiority of the clay should
"be proved correct.

IV.

"That of the two hundred and fifty-three (253) casks "shipped to Everett under the agreement described in "paragraph III hereof, one hundred and thirty-three (133) "casks were of the poorer brand, inferior to sample, and "are now and at all times have been held by this defend- "ant as the property of the plaintiffs and subject to their "orders, together with the six hundred and six (606) casks "inferior to sample also in the hands of this defendant.

V.

"That this defendant has offered, and has at all times "been and now is ready and willing to return the said six "hundred and six (606) casks inferior to sample to the "wharf in the said City of Seattle, where the same were "first unloaded, without expense to the plaintiffs, and here "and now offers so to do, but that the plaintiffs have at "all times been unwilling to receive the same and have "refused to reaccept the same or any portion thereof.

VI.

"That the value of the eight hundred and sixty-one "(861) casks of P. X. Y. clay like the sample is three "thousand three hundred and seventy-five and 12-100 "($3375.12) dollars, and the interest thereon from October "12th, 1907, to date of this answer is the sum of fifty and "63-100 ($50.63) dollars. Defendant herewith brings into "the registry of this court the amount due therefor, to-wit: "the sum of thirty-four hundred twenty-five and 75-100 "($3425.75) dollars.

"Wherefore, defendant prays that the plaintiffs recover "no judgment herein, and that this action be dismissed "without further costs to this defendant."

Thereafter, on November 7, 1910, the plaintiffs filed an amended reply, which is in words and figures as follows, to-wit:

(TITLE.)

"Come now the above named plaintiffs and by leave of "Court first had and obtained file this their amended "reply to the further answer and affirmative defense of "the defendant and deny and allege as follows:

I.

"For reply to paragraph I of the further answer and "affirmative defense of the defendant, plaintiffs admit that "on or about the 11th day of October, 1906, they contracted "to deliver to the defendant from 300 to 400 tons of P. X. Y. "China clay of a quality equal to sample theretofore sub- "mitted by them to the defendant, at the contract price of "70 cents per 100 pounds ex ship at Seattle, Washington, "duty paid, and that thereafter and in the month of Octo- "ber, 1907, they delivered on the wharf of Galbraith-Bacon "& Company at Seattle, 1600 casks of clay, but they deny "that a portion of the clay so delivered did not conform to "sample, and deny that 739 casks thereof or any casks "thereof were far or at all inferior to the sample submit- "ted by them to defendant, and they deny that it is not cus- "tomary in the clay trade to inspect casks on board the "dock in Seattle, and they deny that any expense or incon- "venience would be occasioned by inspection at Seattle, "and they deny that the custom alleged in said paragraph "exists, and they deny that pursuant to said alleged cus- "tom said clay was forwarded to the factory or plant of "defendant at Everett, Washington, but on the contrary, "they allege that said clay was forwarded by the defend- "ant to Everett, Washington, because it had taken deliv- "ery of said clay pursuant to said contract, on dock at "Seattle, Washington, and that said clay so forwarded "was the property of the defendant and so forwarded at "defendant's risk and defendant's expense.

II.

"For reply to paragraph II of the further answer and "affirmative defense of the defendant, plaintiffs deny the "same and each and every allegation therein contained.

III.

"For reply to paragraph III of the further answer and "affirmative defense of defendant, plaintiffs deny the same "and each and every allegation therein contained.

IV.

"For reply to paragraph IV of the further answer and "affirmative denfense of defendant, plaintiffs deny the same "and each and every allegation therein contained.

V.

"For reply to paragraph V of the further answer and "affirmative defense of defendant, plaintiffs deny the same "and each and every allegation therein contained, save and "except they admit that they refused to permit defendant "to return to them any portion of the clay sold and deliv- "ered by them to the defendant.

VI.

"For reply to paragraph VI of the further answer and "affirmative defense of defendant, plaintiffs deny that 861 "casks of the clay so sold and delivered by them to defend- "ant are alone equal to sample, but on the contrary, they "allege that all the clay delivered by them to defendant on "the wharf of Galbraith-Bacon & Company at Seattle, "Washington, is equal to sample, and they deny that inter- "est on the money which by said paragraph defendant "alleges it has paid into Court, from October 12, 1907, to "the date of said answer is the sum of $50.63, but on the "contrary, they allege that the interest upon said amount

"is at the rate of nine (9) per cent per annum, the same "being the contract price and agreement of the parties.

"Further replying to the further answer and affirma- "tive defense of the defendant herein, plaintiffs allege as "follows:

"That the clay which the defendant pretended to reject "was accepted and taken by said defendant to its manu- "facturing plant at Everett, Washington, and there stored "by it; that the said casks of clay pretended to be rejected "were placed in the open, upon the bank of a river, without "any shelter or covering over the same, and the defendant "allowed and suffered the said clay, and now allows and "suffers the same to remain in the open air without shelter "or cover, exposed to the action of the wind, sun, dust, rain "and snow, and further that floods occuring in the river, "on the banks of which the said clay had been placed, over- "flowed the said clay and greatly deteriorated and depre- "ciated its value; that the said clay was not in condition "to be returned to the plaintiffs herein, and the same was "not in the condition that it was when delivered to the "defendant; that the said clay now is worthless and of no "value whatsoever, the decrease and loss of value being "due to the defendant's carelessness and negligence in not "properly storing the clay and reasonably protecting it "from the elements which so greatly damaged it.

"Wherefore, plaintiffs demand judgment in accordance "with the prayer of their complaint."

Thereafter, upon a trial of the case an opinion was rendered by the Court, speaking through Judge Hanford, upon the merits, which is in the following words and figures, to-wit:

(TITLE.)

"This is an action at law, tried by the Court, a jury "trial having been waived. The action is to collect the "price of 400 tons of China clay sold and delivered by the

"plaintiffs to the defendant. The contract for the sale of "the clay was made by correspondence between the parties, "and as construed by the Court, it is a contract for a sale "by sample, and there is an implied warranty of quality "corresponding to the sample referred to in the correspond- "ence. 15 Am. & Eng. Enc. of Law (2nd Ed.) pages 1225-6. "The clay was bought in England and transported by ship "to Seattle, and there is no dispute between the parties "as to the quantity of the clay shipped and delivered, nor "as to the contract price which the defendant promised to "pay therefor. It is admitted also that payment of the "purchase price has been demanded and refused, except "as to part, and other jurisdictional facts are admitted. "The contract, as construed by the Court, obligated the "defendant to receive the clay from the ship, which con- "dition precluded inspection by the purchaser before deliv- "ery. This is so for the reason that clay, to be of the qual- "ity warranted, must be of uniform white color and free "from grit, and to determine the quality, time, favorable "conditions and special conveniences for testing are nec- "essary, and these essentials make a fair inspection while "the ship is being discharged impracticable. The defend- "ant did not in fact inspect the clay to ascertain its quality "before receiving it, but afterwards ascertained that it "came from two different sources of supply and that it is "not uniform in quality, 800 barrels thereof being inferior "to the sample and unsuitable for the defendant's use. "The defendant used and has tendered payment at the con- "tract rate for 861 barrels, and disputes its liability to pay "for 800 barrels because of the inferior quality thereof. "The plaintiffs' contention is that notwithstanding the "inferior quality of 800 barrels of the clay, the defendant "accepted delivery of the entire consignment, and by doing "so waived its right to reject any part of the same. The "defendant did not intend a waiver of its right to have "delivered that which it had agreed to buy and pay for, "viz.: Clay of the same quality as the sample. On the "contrary, it was prompt in giving notice to the plaintiffs

"of the inferior quality of the clay, and has acted fairly "towards them in minimizing the loss by making use of, "and tendering payment for, all of the clay fit for use and "by holding the rejected portion subject to the plaintiffs' "right to dispose of it. The plaintiffs' contention is "founded upon the false idea that the defendant was "legally bound to either accept the commodity of which "delivery was tendered, and pay the contract price for all "of it, regardless of its quality, or else refuse to receive "possession of it. This idea is contrary to the rule of law "applicable to the case, because it ignores the implied war- "ranty upon which the defendant had a right to rely. The "defendant acted within its legal rights in taking posses- "sion of the clay and resisting the plaintiffs' demand for "the price of the portion inferior to the sample. In this "country the rule is well established by numerous decisions "of the courts that a breach of an implied warranty of "quality entitles the vendee to retain the goods and when "sued for the purchase price to set up the breach of war- "ranty to reduce the sum recoverable by the vendor. 15 "Am. & Eng. Enc. of Law (2nd Ed.) page 1255; 24 id., "page 1158; Saunders v. Short, 86 Fed. Rep, 225; Andrews "v. Schreiber, 93 Fed. Rep. 367; Florence Oil & Refining "Co. v. Farrar, 109 Fed. Rep. 254. The measure of dam- "ages which the vendee may claim for breach of an implied "warranty of quality is the difference between the actual "value of the property delivered and the higher value of "the warranted quality; and if there is no other evidence "of value, the price agreed to be paid will be regarded as "the value of the property of the quality warranted. In "this case, the defendant having offered to return the "inferior clay and to hold it subject to disposition by the "plaintiffs, the contract price is the measure of damages "which it is entitled to recoup.

"The Court directs that findings be prepared in "accordance with this opinion, and the judgment to be "entered will be that the plaintiffs take nothing, save and "except the amount of money deposited in the registry of

"the Court by the defendant, and that the defendant "recover the taxable costs occasioned by the litigation sub- "sequent to the making of said deposit."

SPECIFICATIONS OF ERROR

The following are the specification of errors relied upon by plaintiffs in error and which are intended to be urged by it upon the writ of error as grounds for reversal of said judgment in the Circuit Court.

This specification of errors is the same as the assignment of errors (transcript of record, page 49):

I.

"That the United States Circuit Court in and for the "Western District of Washington, Northern Division, erred "in overruling the objection of counsel for plaintiffs in "error to the introduction of evidence at the trial of said "cause of the letter being marked defendant's exhibit No. "'1.' That the said letter is in words and figures as fol- "lows, to-wit:

"DEFENDANT'S EXHIBIT NO. '1.'

"Meyer, Wilson & Co., "Portland, Oregon.
"Meyer, Wilson & Co., "San Francisco, Cal.
"Meyer, Wilson & Co., "Liverpool.

Telegraphic Addresses:
'Meyer,' Portland.
'Meyer,' San Francisco.
'Rodgers,' Liverpool.

"Received Oct. 1, 1906. "Everett Pulp & Paper Co.

Answered Oct. 1, 1906.
Wm. Howarth.

"Portland, Oregon, Sept. 29, 1906. Saturday.

"Messrs. Everett Pulp & Paper Co., "Everett, Washington.

"Dear Sirs: Referring to the correspondence we had "heretofore with you regarding China clay, we now have

"the pleasure of advising you that we send you under sep-
"arate cover a sample marked 'P. X. Y.' of an English
"China clay, which the makers believe matches your own
"sample very well, and we trust that you will find it so. It
"is probable that we could work your order for a quantity
"of not less than 400 to 500 tons of this P. X. Y. China
"clay in one-half ton casks with extra iron hoops, which
"packages have in our previous shipments proved very sat-
"isfactory, indeed, at the price of 76½ cents per 100
"pounds ex ship at Seattle; wharfage, if any, on the goods
"for buyer's account as usual. Will you kindly let us
"know whether you are inclined to place an order with us
"on this basis. We have not a vessel at the present time,
"but our efforts are toward securing such a ship for Puget
"Sound. We have actually secured a vessel for the same
"business for Portland, Oregon, but this, of course, does
"not help us in any transaction with you. Sailing vessels
"are somehow becoming scarcer and scarcer for this desti-
"nation, as owners seem to prefer to send their craft in
"other directions; therefore we would suggest that it would
"be well to place your order with us subject to cable reply
"in, say, a week or even a fortnight, so as to give our Liver-
"pool house a fair chance to work up the business, and in
"conjunction with the same, the balance of the cargo.

"We may say that freights are quite high at present,
"but they are also very likely to remain so for many months
"to come, as the demand for building material at San Fran-
"cisco, and also for Valparaiso, has the tendency to stiffen
"the freight market.

"One reason why we are approaching you at the present
"time is that we have other cargo for Puget Sound in sight,
"and various business has to be worked up in conjunction
"with the China clay to complete the transaction. We may
"say, when we report that the casks we use have given
"satisfaction, that we have a number of shipments deliv-
"ered here to go by, and we have given this matter of secur-
"ing a satisfactory package for China clay very consider-
"able attention, so that it has happened repeatedly that we

"have delivered China clay in excellent order and condi-
"tion when others received their shipments practically in
"bulk.

"Hoping to hear from you, we are, dear sirs,

"Yours very truly,

"MEYER, WILSON & CO.

"If you elect to place an offer with us we shall imme-
"diately cable same to our Liverpool house, who will then
"work on the matter at once and try to bring it to com-
"pletion as quickly as possible. M., W. & Co."

2.

"That the said Court erred in overruling the objection
"of counsel for plaintiffs in error to the introduction of
"evidence at the trial of said cause of a sample of clay, the
"same being marked defendant's exhibit '2.'

3.

"That the said Court erred in overruling the objection
"of counsel for plaintiffs in error to the introduction of
"evidence at the trial of said cause of a letter written by
"the defendant to the plaintiffs under date of October 11,
"1906, said letter being marked defendant's exhibit '3,' and
"is in words and figures as follows, to-wit:

"DEFENDANT'S EXHIBIT NO. '3.'

"October 11-'06.

"Mr. Alfred Tucker,
"Care of P. J. Fransioli & Co.,
"Seattle, Washington.

"Dear Sir: Confirming the writer's telephonic com-
"munication to you today; please enter our order for 3/400
"tons of P. X. Y. China clay, to be fully equal to the sample
"which you submitted to us, at the price quoted by you,
"viz.: 70 cents per 100 pounds, ex ship at Seattle, duty
"paid.

"It is understood that this is to be packed in 5-cwt. casks "reinforced with iron hoops, and is for November/Decem- "ber shipment.

"Kindly send us your confirmation of this.

"This being our initial order with you, we sincerely "hope that everything will come out satisfactory, and that "a nice business will result. Yours truly,

"Secretary."

4.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of the witness, Augustus Johnson:

"Q. 'You say you made this examination. What is "the use to which clay is placed in the paper business, and "why is it necessary for you to examine the color and per- "centage of grit?' To which question counsel for plaintiffs "in error objected, which objection was overruled by the "Court, to which ruling the plaintiffs then and there duly "excepted, which exception was allowed by the Court. In "answer to the question witness responded as follows:

"A. 'Clay is used as a filler in the paper manufacture "in order to close the pores between the fibers. The per- "centage of grit is the important feature for the reason "that if it contains a large percentage of grit it will show "up and make the paper spotty; the paper, therefore, "becomes unmerchantable. A printer cannot use it for "the reason that it wears out his type.'

"Q. 'Does it have any effect upon the use for writing "paper upon the pen?'

"A. 'It does. The pen will scratch. It is very unsatis- "factory for that. Further, in the case of grit in clay it "wears out the wires on the paper machines.'

"Q. 'What effect does the wearing out of the wire have "upon increasing the cost to the manufacturer?'

"A. 'A great deal of effect. Further, it must have a "white color in order to produce a white sheet of printing "paper.' "

5.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the introduction of "evidence at the trial of said cause of a letter dated Octo- "ber 15, 1907, written by the plaintiffs in error to the "defendant, which said letter is marked defendant's exhibit " '5,' and is in words and figures as follows, to-wit:

"DEFENDANT'S EXHIBIT NO. '5.'

"Meyer, Wilson & Co.,
"Portland, Oregon.
"Meyer, Wilson & Co.,
"San Francisco, Cal.
"Meyer, Wilson & Co.,
"Liverpool.

Telegraphic Addresses:
'Meyer,' Portland.
'Meyer,' San Francisco.
'Rodgers,' Liverpool.

"Everett Pulp & Paper Co.
"Received Oct. 17, 1907.
"A. M. Answered P. M.
"7-8-9-10-11-12 1-2-3-4-5-6

"Portland, Oregon, Oct. 15, 1907.

"Messrs. The Everett Pulp & Paper Co.,
"Everett, Washington.

"Dear Sirs: The samples of China clay, ex 'Mozam- "bique,' which you forwarded us, we immediately passed "on to our San Francisco house, and they in turn sub- "mitted these samples to experts, and they now report to "us on same as follows: 'To sum up the whole thing we "may state that the China clay shipment, ex 'Mozambique,' "is up to the original sample.' In this connection we may "tell you that when we sent you the sample of P. X. Y. "China clay, upon which you purchased from 300-400 tons, "we retained one-half of the sample here, and this we for- "warded, with the others from yourselves, to our San Fran- "cisco house, so that they and experts have had every "opportunity of studying this matter fully.

"Regarding the different colors, it is stated that these "are readily explained by the different degrees of moisture

"in the clay, and that when the clay is dried out the sample "regains the original color; that samples taken from differ- "ent parts of the same casks show slight differences in the "color is accounted for by the fact that in the parts of the "barrel more exposed to moisture the clay is darker, whereas "where less exposed it is lighter. Absolutely no sand has "been found in any of the samples of the clay you furnished "us, there being a total absence of grittiness, and, therefore, "there can be no extraneous matter. The samples were "submitted to a man of very considerable experience in "San Francisco in China clays, and after thoroughly exam- "ining the samples he stated that there was neither sand "nor grit in any of the samples, and, further, that the clay "was all of one color, but that some had absorbed moisture "of a more or less degree, which affected the color some- "what, but that it was quite evident to him that the samples "were all the same clay and of the same color originally, "which undoubtedly it would regain when dried.

"You will, of course, recall that we sold you this ship- "ment of clay not to be as per sample, but after submitting "you sample of the P. X. Y. brand to show you the gen- "eral quality of same we sold you 300-400 tons of the "P. X. Y. brand. Throughout the world it is the custom, "even if one sells as per sample, to sell only about as per "sample, for none of these samples can be absolutely "guaranteed, as is, of course, well known to you.

"You are, of course, also aware that you had to take "delivery of the China clay from alongside vessel as dis- "charged in Seattle, and that it was your duty to have "a representative at the ship to examine the clay and "accept or decline the clay there on the wharf where dis- "charged. We never agreed to allow the clay to be trans- "shipped from Seattle to Everett to your works, and there "accept or reject. The terms of our contract are very clear "on this.

"We have been hoping to hear of your Mr. Johnson's "return from San Francisco and that he would call upon "us when passing through Portland. We presume that he

"has not yet reached Everett and that we may expect a "call from him any time, when we shall, of course, go over "the matter very thoroughly with him, and it is quite pos- "sible that the writer may be in Seattle in the near future, "when, if it be deemed expedient, he can run up to Everett.

"Yours very truly,

"Pr. Pro. MEYER, WILSON & CO.
"Alfd. Tucker."

6.

"That the said Court erred in overruling the motion by "counsel for plaintiffs in error to strike from the record "the following testimony given and offered by Augustus "Johnson:

"Q. 'Now, after this ship Mozambique arrived and a "portion of the clay had been taken to the defendant's "works at Everett, state, if you please, what the defend- "ant did with the clay with reference to its use.'

"A. 'The clay was landed at our wharf and stored in "the yard in our usual clay storing place. We were short "of clay. We were anxious for the arrival of the ship and "immediately upon receiving a telegram from Mr. Tucker "to the effect that the Mozambique had arrived we pro- "ceeded to bring the clay to the mill. There were a few "broken casks—some broken casks, and we started to use "that first. It was discovered almost immediately that the "color of the paper was down, and we started to trace and "it was found that it was the clay. Instructions were then "given to discontinue the use of that clay. Mr. Tucker was "advised, and after a great deal of correspondence Mr. "Tucker came to the mill.'

"Q. 'I will now show you a letter dated October 15th, "1907, and ask you if that was a letter which you received "from the Meyer, Wilson Company, signed by Mr. Tucker, "in regard to this clay at that time.' (Hands witness "paper)?

"A. 'That is the letter.'

"Mr. Brownell: We offer the letter in evidence as "defendant's exhibit '5.'

"The Court: It may be admitted.

"Defendant's exhibit '5' is in words and figures as fol- "lows, to-wit:

"DEFENDANT'S EXHIBIT NO. '5.'

"Meyer, Wilson & Co., Telegraphic Addresses:
"Portland, Oregon. 'Meyer,' Portland.
"Meyer, Wilson & Co., 'Meyer,' San Francisco.
"San Francisco, Cal. 'Rodgers,' Liverpool.
"Meyer, Wilson & Co.,
"Liverpool.

"Everett Pulp & Paper Co.
"Received Oct. 17, 1907.
"A. M. Answered P. M.
"7-8-9-10-11-12 1-2-3-4-5-6

"Portland, Oregon, Oct. 15, 1907.

"Messrs. The Everett Pulp & Paper Co.,
"Everett, Washington.

"Dear Sirs: The samples of China clay, ex 'Mozam- "bique,' which you forwarded us, we immediately passed "on to our San Francisco house, and they in turn submit- "ted these samples to experts, and they now report to us "on same as follows: 'To sum up the whole thing we may "state that the China clay shipment, ex 'Mozambique,' is "up to the original sample.' In this connection we may "tell you that when we sent you the sample of P. X. Y. "China clay, upon which you purchased from 300-400 tons, "we retained one-half of the sample here, and this we for- "warded, with the others from yourselves, to our San Fran- "cisco house, so that they and experts have had every "opportunity of studying this matter fully.

"Regarding the different colors, it is stated that these "are readily explained by the different degrees of moisture "in the clay, and that when the clay is dried out the sample "regains the original color; that samples taken from differ-

"ent parts of the same casks show slight differences in the "color is accounted for by the fact that in the parts of the "barrel more exposed to moisture the clay is darker, "whereas, where less exposed it is lighter. Absolutely no "sand has been found in any of the samples of the clay you "furnished us, there being a total absence of grittiness, "and, therefore, there can be no extraneous matter. The "samples were submitted to a man of very considerable "experience in San Francisco in China clays, and after "thoroughly examining the samples he stated that there "was neither sand nor grit in any of the samples, and, fur- "ther, that the clay was all of one color, but that some had "absorbed moisture of a more or less degree, which affected "the color somewhat, but that it was quite evident to him "that the samples were all the same clay and of the same "color originally, which undoubtedly it would regain when "dried.

"You will, of course, recall that we sold you this ship- "ment of clay not to be as per sample, but after submitting "you sample of the P. X. Y. brand to show you the gen- "eral quality of same we sold you 300-400 tons of the "P. X. Y. brand. Throughout the world it is the custom, "even if one sells as per sample, to sell only about as per "sample, for none of these samples can be absolutely guar- "anteed, as is, of course, well known to you.

"You are, of course, also aware that you had to take "delivery of the China clay from alongside vessel as dis- "charged in Seattle, and that it was your duty to have a "representative at the ship to examine the clay and accept "or decline the clay there on the wharf where discharged. "We never agreed to allow the clay to be trans-shipped "from Seattle to Everett to your works, and there accept "or reject. The terms of our contract are very clear on "this.

"We have been hoping to hear of your Mr. Johnson's "return from San Francisco and that he would call upon "us when passing through Portland. We presume that he "has not yet reached Everett and that we may expect a

"call from him any time, when we shall, of course, go over "the matter very thoroughly with him, and it is quite pos- "sible that the writer may be in Seattle in the near future, "when, if it be deemed expedient, he can run up to Everett.

"Very truly yours,

"Pr. Pro. MEYER, WILSON & Co.

"Alfd. Tucker."

"Q. How were those casks marked, Mr. Johnson?

"A. Those casks were marked with a Diamond A, "Great Britain.

"Q. Were they marked with the term P. X. Y.?

"A. No, sir.

"Q. Was there anything on the casks to designate "P. X. Y.?

"A. None whatever.

"Q. What was meant by the term P. X. Y. as used in "this correspondence and in the contract which was exe- "cuted?

"A. It simply referred to the samples of clay that had "been submitted to us as being a sample of that particular "brand that they had offered to us. We always buy clay on "sample. We must do it. We request a sample, and in "making a purchase of clay, samples are immediately sub- "mitted for a test to see if they suit our purposes.

"Q. Of this shipment what proportion was in accord- "ance with this sample inspected by you as the P. X. Y. "brand?

"A. Well, that I can't say, Mr. Brownell, what propor- "tion, because I left the mill in January after that. I went "to San Francisco.

"Q. You then took charge of the San Francisco office?

"A. Yes, sir.

"Q. And you had no further connection with this par- "ticular transaction?

"A. No.

"Mr. Brownell: That is all.

"Counsel for plaintiffs in error moved the Court to "strike the testimony of Mr. Johnson from the record on "the ground and for the reason that the contract entered "into between the parties and introduced in evidence "showed that the clay was to be taken from alongside the "vessel at once upon discharge at Seattle, Washington, "the testimony of witness being to the effect that the clay "was not to be accepted from place mentioned in said con- "tract and, furthermore, the testimony of witness showed "that it did take delivery at such place, assume ownership "and dispose of same according to the defendant's wishes, "which evidence of the disposing of the clay after accept- "ing the same was immaterial to any issues presented in "this cause. Which motion to strike the Court denied, to "which ruling the plaintiffs then and there duly excepted, "which exception by the Court was then and there allowed."

7.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of witness Alex Baillie:

"Q. 'Are you acquainted with the customs prevailing "at the Port of Seattle with respect to inspection and "delivery and examination of China clay as it arrives on "board ship?' which objection was by the Court overruled "and an exception duly allowed to the plaintiffs in error, "to which question in answer thereof the following testi- "mony was given by Alex Baillie:

"A. 'I am.'

"Q. State now, if you please, what is meant by the "term 'Delivery ex ship,' or alongside ship on the dock at "Seattle, as distinguished from examination and inspec- "tion of the quality or class, if there is such a distinction "in the trade.

"Mr. Hunt: If your honor, please, I wish it to be "understood that my objection goes to this whole line of "testimony.

"The Court: Yes, you can have your exception.

"A. Well, acceptance of delivery is considered simply "the condition of the packages.

"Q. I beg your pardon?

"A. The condition of the packages.

"Q. Well, if it is casks, what does it mean? By pack- "ages you mean casks?

"A. Yes, or bags, or boxes, or anything.

"Q. In the China clay trade, would it be possible to "ascertain the character of China clay as to being of a cer- "tain brand or not, alongside of the ship?

"A. I should think not.

"Q. I call your attention now to defendant's exhibit "'1,' being the contract in this case in which the words "occur, 'Net invoice weight ex ship at Seattle, Washing- "ton,' also, 'Purchaser to take delivery of China clay from "alongside of vessel at once on discharge at Seattle,' and "ask you if in the trade the language of that contract "would mean that an inspection to determine the class and "character of the clay must be made alongside of the ship, "or if any inspection should be made alongside of the ship "other than to determine whether any of the casks were "broken or not?

"A. I don't see how the quality could be determined "alongside ship.

"Q. In your business would the word 'delivery,' used "in a contract like that, be held to include an inspection "and examination of the class and character of the con- "tents?

"Mr. Hunt: I object to that question. Mr. Baillie's "business may not be pertinent in this case.

"Q. Well, in the trade as you have carried it on; in the "China clay trade as you have carried it on?

"A. No."

8.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of the witness A. H. P. Jordan:

"Q. 'Now, then, with reference to the trade, the terms "of purchase and sale of China clay; by the term 'delivery' "of China clay in the trade, particularly as the trade takes "place here in the City of Seattle and State of Washing- "ton—what is meant?' which objection of counsel for plain- "tiffs in error was overruled by the Court and the excep- "tion duly allowed; to which question the witness "responded as follows:

"A. Why, the clay that we have bought for delivery— "it means the taking of the clay at the ship's side.

"Q. Is it possible at the ship's side to make a test as to "the character and quality of the clay which you have "described; commercially possible?

"A. No.

9.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of the witness A. H. P. Jordan:

"Q. 'What effect would clay containing the percentage "of grit like the sample rejected have upon the paper mak- "ing machine?' which objection the Court overruled, the "plaintiffs in error being allowed an exception. The "answer of the said witness to the said question is as fol- "lows:

"A. 'Well, it wears out what is called the cloth on the "machine. The shape of the paper is formed on an apron "of wire, the cost of which is about $125 or $130, and a "large percentage of grit running in the paper, the wire is "endless and travels round and round, forming the sheet "on top—that rapidly wears out this wire, which instead "of lasting, as it should, about twenty days it lasts six or "eight. It also wears out the rolls on the machine and the "wheels and the belts which carry the wet paper.

10.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of witness A. H. P. Jordan:

"Q. 'Did I ask you what sort of effect this had in the "paper itself, besides increasing the cost of manufactur- "ing?" which objection said Court overruled and duly "allowed the plaintiffs in error an exception; to which "question the witness replied:

"A. 'Well, this clay we rejected; we simply couldn't "use it in the manufacture of our grade of paper.'

11.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to a photograph of a "shipment of clay placed in the storage yard of the defend- "ant, which objection was overruled by the Court and an "exception duly allowed the plaintiffs in error.

12.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of witness William Howarth:

"Q. 'By the term 'delivery' in the trade and in these "contracts that are made, what is the usual understand- "ing, or what is the understanding in the trade as com- "pared with acceptance or examination?' to the overruling "of which objection counsel for plaintiffs in error excepted, "which exception was duly allowed. In reply to the above "question witnesss replied as follows:

"A. 'My understanding is that any apparent defects "which can be discovered at the ship's side must be com- "plained of at that time, so that the rights of the shippers "have not been stopped as against the ship, if there has "been any apparent damage caused en route. As far as "examination of enclosed packages, such as clay, where "the defects are not latent, and where it needs consider-

"able time and skill to make the examinations, then the "goods have always been permitted to go up to the mill, "even after the defects have been found, and this is the "first instance that we have been advised that we have "taken delivery and that we have, by not rejecting the ship- "ment at the ship's side, accepted the shipment, and we "must pay for it whether it contains another thing than "what we contracted for.

13.

"That the said Court erred in overruling and denying "the motion made by counsel for plaintiffs in error at the "close of the testimony for judgment on the pleadings, and "also for verdict and judgment upon the case upon the fol- "lowing grounds:

"1. That the defendant had pleaded in its answer and "its evidence proved that it had accepted 861 casks of the "clay, which conformed to the sample submitted, and that "it had rejected 606 casks, which were alleged to be inferior "to the said sample. That under the pleadings and the evi- "dence and where a contract for the sale of personal prop- "erty is entire the defendant will not be allowed to accept "performance of a part of said contract and reject per- "formance of another part.

"2. That under and by the pleadings the defendant has "not counter-claimed for any damages sustained by reason "of the alleged breach of warranty, and hence none can be "allowed to it.

14.

"That the said Court erred in making the following "finding:

" 'The defendant acted within its legal rights in taking "possession of the clay and resisting the plaintiffs' demand "for the price of the portion inferior to the sample. In this "country the rule is well established by numerous decisions "of the courts that a breach of an implied warranty of

"quality entitles the vendee to retain the goods, and when "sued for the purchase price to set up the breach of war- "ranty to reduce the sum recoverable by the vendor. The "measure of damages which the vendee may claim for "breach of an implied warranty of quality is the difference "between the actual value of the property delivered and the "higher value of the warranted quality, and if there is no "other evidence of value the price agreed to be paid will "be regarded as the value of the property of the quality "warranted.

"In this case, the defendant having offered to return "the inferior clay and to hold it subject to disposition by "the plaintiffs, the contract price is the measure of dam- "ages which it is entitled to recoup.'

"That the said finding is contrary to the evidence which "is given by Mr. W. J. Pilz, and which is as follows:

"Q. (By Mr. Hunt): Did you sell a part of the clay "remaining in the yard—of the rejected clay?

"A. I made arrangements to sell it.

"Q. How much did you sell?

"A. About nine tons.

"Q. What was the price which you received.

"A. Part of the clay, I think, sold for $17 a ton of "2,000 pounds at the mill. I think one shipment I sold for "$15, as it was a sample shipment for a carload.

"Q. (By Mr. Brownell): State that in pounds, because "the contract is in pounds.

"A. $17 would be 85 cents a hundred pounds.

"Q. 85 cents a pound?

"A. No, 85 cents a hundred pounds. $17 a ton."

In the argument which here follows the plaintiffs in error deem each specification of error well taken, but we desire to direct the particular attention of the Court to specifications of errors 13 and 14 as being the most serious and which will be most strongly urged upon this writ of error.

ARGUMENT

SPECIFICATIONS OF ERROR ONE AND THREE

Specifications of error 1 and 3 relate to the admission of correspondence between these parties prior to the execution of the formal written contract between them.

We do not believe that any correspondence which may have passed between the parties to this action prior to the date of the formal written contract is pertinent or has any bearing upon the question to be determined under the issues presented in the case. These letters were admitted over the objection and exception of counsel for the plaintiffs in error, the ground of the objection being that any evidence of the prior negotiations should be excluded inasmuch as the parties afterwards entered into a formal written contract which embraced all the terms and conditions which the parties desired to have therein. It is an elementary principle of law that all prior negotiations are merged into the subsequent written agreement, and that evidence of such prior negotiations should be excluded. We are of the impression that the principle suggested here is too elementary to deserve an extended comment in this brief.

We would refer the Court to 2 Parsons on Contracts, 7th Ed. page 678 (bottom paging), where it is said:

"For if a negotiation be conducted in writing, and even "if there be a distinct proposition in a letter, and a distinct "assent, making a contract, and then the parties reduce "this contract to writing, and both execute the instrument, "this instrument controls the letters, and they are not per- "mitted to vary the force and effect of the instrument, "although they may sometimes be of use in explaining its

"terms. Another is, the same desire to prevent fraud "which gave rise to the statute of frauds; for as that statute "requires that certain contracts shall be in writing, so this "rule refuses to permit contracts which are in writing to "be controlled by merely oral evidence. But the principal "cause alleged in the books and cases is, that when parties, "after whatever conversation or preparation, at last reduce "their agreement to writing, this may be looked upon as "the final consummation of their negotiations, and the "exact expression of their purpose. And all of their earlier "agreement, though apparently made while it all lay in "conversation, which is not now incorporated into their "written contract, may be considered as intentionally "rejected. The parties write the contract when they are "ready to do so, for the very purpose of including all that "they have finally agreed upon, and excluding everything "else, and make this certain and permanent. And if every "written contract were held subject to enlargement, or "other alteration, according to the testimony which might "be offered on one side or the other as to previous inten- "tion, or collateral facts, it would obviously be of no use "to reduce a contract to writing, or to attempt to give it "certainty or fixedness in any way."

We would respectfully refer to the cases cited in the notes sustaining the statement in the text.

Also the case of Rucker v. Bolles, 133 Fed. 858, and Davis Calyx Drill Co. v. Mallory et al., 137 Fed. 332.

Under the authorities herein quoted we believe the trial Court erred in admitting and receiving these letters marked defendant's exhibit No. "1" (transcript of record, page 34) and defendant's exhibit No. "3" (transcript of record, page 52); the dates of these letters being, respectively, September 29, 1906, and October 11, 1906, and the date of the contract being October 15, 1906 (transcript of record, page 32).

SPECIFICATIONS OF ERROR FOUR, NINE AND TEN

Specifications of error 4, 9 and 10 relate to the admission of testimony which was intended to show that the clay accepted was not fit for the purposes intended by the Everett Pulp & Paper Company, and that the said clay was harmful to the machinery of the defendant.

Counsel for the defendant asked the witness Augustus Johnson (transcript of record, pages 52 and 53) the following question: "You say you made this examination. "What is the use to which clay is placed in the paper busi- "ness and why is it necessary for you to examine the color "and percentage of grit?" The answer, over the objection of counsel for the plaintiffs, was as follows: "Clay is "used as a filler in the paper manufacture in order to close "the pores between the fibers. The percentage of grit is "the important feature, for the reason that if it contains "a large percentage of grit it will show up and make the "paper spotty; the paper, therefore, becomes unmerchant- "able. A printer cannot use it, for the reason that it wears "out the type." The witness further testified, over objection of counsel for plaintiffs, that a pen used upon such paper would scratch, and, further, such clay wears out the wires on the paper machine; and, further, that it must have a white color in order to produce a white sheet of printing paper.

The same question was asked of the witness A. H. P. Jordan (transcript of record, page 62), to which the witness replied in a similar way as did the witness Johnson, and further described the action of the wire in paper making machinery, the purpose of such wire, and the period for

which such wire would last, and the period for which such wire would last when grit was contained in the clay.

In specification of error 10 witness A. H. P. Jordan was asked what effect the clay had upon the paper besides increasing the cost, to which the witness responded that the clay could not be used for that grade of paper which was manufactured by the defendant company (transcript of record, page 62).

We believe that the trial Court committed error in allowing the testimony to be given as to what effect this clay had on the paper or the cost of manufacture. No question was raised or presented by the issues of this case, for the complaint as filed was upon a contract for the purchase of 300 to 400 tons of China clay (transcript of record, page 32), and the answer alleged the admission of the contract, but that the clay did not correspond to sample and was rejected. The pleadings do not show, neither does the evidence, that this clay was sold by the plaintiffs in error in contemplation of its use for the manufacture of any particular grade of paper, or as a matter of fact for any class or quality of paper whatsoever. The plaintiffs in error did not sell the clay with a warranty that it was appropriate for the manufacture of a particular grade of paper, but the clay was sold only as clay of P. X. Y. brand. If the issue had been properly presented that the clay was sold with a warranty that it was fit for a particular grade of paper then such evidence as offered by these witnesses would have been competent, but the sole issue tendered, that would have any relevancy to this point, was whether or not the clay sold and received by the defendant in error was P. X. Y. brand. We submit to this honorable Court

that the evidence under this specification which tended to show that the clay delivered was not fit for the grade of paper manufactured by the defendant in error was wholly incompetent and irrelevant and immaterial to the issue to be decided by the Court. Such evidence tended to confuse the record and cloud the issues which were formally tendered by the pleading. As far as the contract goes, and the contract is set out on page 32 of the transcript of record, and so far as the pleadings are made relative to said contract no question could have properly been presented to the trial Court as to the effect or expensiveness of the use of the clay so delivered to the defendant in error. And, further, nothing is made to appear that the plaintiffs in error knew what quality of paper, if any, was manufactured by the defendant in error, be it common wrapping paper or high grade book paper. As is said in 9 Wallace's Reports (U. S. Supreme Court), page 726, testimony as to whether or not an article purchased under contract is suitable for the purposes to which it is intended is "inad-"missible * * * * because in such a suit the only questions "are what did the contract call for, and what did the man-"ufacturer furnish."

We would refer this honorable Court to the case of Horner v. Parkhurst et al., 17 Atl. (Maryland) 1027, where it is said:

"Where the seller delivers goods of the character and "quality represented, it is no defense to an action for the "price that they proved to be unsuitable for the buyer's "use."

Also the case of Scott et al. v. McDonald, 9 S. E. (Ga.), page 770.

Upon the authority of these cases and upon the authority and recognized rules of pleading and evidence we submit that the trial Court committed error in receiving the testimony herein complained against.

SPECIFICATION OF ERROR SIX

The sixth specification of error relates to the testimony given by the witness Augustus Johnson, who testified (transcript of record, page 38) that after the clay had been discharged at the dock in Seattle, as per contract (transcript of record, page 32), the defendant in error took possession and shipped the same to its dock at Everett, Washington, and there stored the clay in the yard, that place being its usual storing place; that this was done after a telegram had been received from the managing agent of plaintiffs in error that the clay had arrived in Seattle as per contract, a few of the casks were broken, it was discovered that the paper was down in color and the cause was traced to the use of the clay. Witness identified a letter written to the defendant in error by the plaintiffs in error, which was marked defendant's exhibit No. "5" (transcript of record, page 39), in which the plaintiffs in error denied that the clay so shipped did not correspond to the P. X. Y. brand, and accounted for the difference in color by the fact that some of the clay had absorbed more moisture than the rest, which would have a tendency to make it darker in color until the same was dried out. In this letter we call this Court's attention to the second paragraph from the end (transcript of record, page 40), where it is said: *"You are, of course, also aware that you had to "take delivery of the China clay from alongside vessel as*

"discharged in Seattle, and that it was your duty to have "a representative at the ship to examine the clay and accept "or decline the clay there on the wharf where discharged. "We never agreed to allow the clay to be trans-shipped "from Seattle to Everett to your works, and there accept "or reject. The terms of our contract are very clear on "this." Mr. Johnson further testified that all of the casks were marked with a Diamond A, Great Britain; that there was no marking on the casks of P. X. Y. Witness further testified of the custom of the defendant in error in receiving samples and purchasing on samples. At the conclusion of the testimony counsel for the plaintiffs in error moved the Court to strike the testimony of Mr. Johnson from the record, for the reason *that the purchaser was to take delivery of China clay from alongside vessel at Seattle, Washington, and, further, that the testimony of the witness shows that it had taken possession and delivery of the clay in the place specified in the contract, namely, from alongside vessel on discharge, had assumed complete ownership thereof and trans-shipped the same to Everett, a city about thirty miles from Seattle, the same being the place where its works were situated.* Whatever the defendant in error did after they accepted delivery of the clay is wholly immaterial to any issue presented in this case, and the same argument as presented under specifications 4, 9 and 10 is applicable here. Whatever may have been done with the clay after it passed to the ownership of the defendant in error is inapplicable to the issue of the case. Furthermore, Mr. Johnson testified, as we have heretofore said, as to the custom of the defendant in error in buying clay and having samples submitted. Such custom is not binding upon the

plaintiffs in error, the vendors of this property, and it had no place in this case. We submit that the testimony of Mr. Johnson was given under a ruling of the Court which was error.

SPECIFICATION OF ERROR SEVEN

Specification of error 7 relates to the testimony offered by Alex Baillie, a witness on behalf of the defendant in error. The testimony of Mr. Baillie was introduced for the purpose of showing a custom in the Port of Seattle in order to change and vary the clear and unambiguous terms of the written contract. We quote the testimony of Mr. Baillie which is pertinent to the point here presented. The following questions were asked of and given by the witness Baillie (transcript of record, page 60) :

"Q. Are you acquainted with the customs prevailing "at the Port of Seattle with respect to inspection and deliv-"ery and examination of China clay as it arrives on board "ship?" to which the witness responded, over the objection of plaintiffs in error, "A. I am."

"Q. State now, if you please, what is meant by the "term 'Delivery ex ship,' or alongside ship on the dock at "Seattle, as distinguished from examination and inspec-"tion of the quality or class, if there is such a distinction "in the trade."

"A. Well, acceptance of delivery is considered simply "the condition of the packages."

"Q. Well, if it is casks, what does it mean? By pack-"ages you mean casks?"

"A. Yes, or bags, or boxes, or anything."

"Q. In the China clay trade, would it be possible to "ascertain the character of China clay as to being of a cer-"tain brand or not, alongside of the ship?"

"A. I should think not."

"Q. I call your attention now to defendant's exhibit "'1,' being the contract in this case in which the words "occur, 'Net invoice weight, ex ship at Seattle, Washing- "ton,' also, 'Purchaser to take delivery of China clay from "alongside of vessel at once on discharge at Seattle,' and "ask you if in the trade the language of that contract "would mean that an inspection to determine the class and "character of the clay must be made alongside of the ship, "or if any inspection should be made alongside of the ship "other than to determine whether any of the casks were "broken or not?"

"A. I don't see how the quality could be determined "alongside ship."

"Q. In your business would the word 'delivery' used "in a contract like that be held to include an inspection "and examination of the class and character of the con- "tents?"

"A. No."

The testimony of the witness Baillie was given for the purpose of showing a custom or usage which varied and changed the terms of a written contract. Under the authorities such testimony will not be received, and the admission of the same is contrary to all rules of evidence.

The contention of counsel for plaintiffs in error is that the contract entered into between these parties is plain and unambiguous, and if this is true, evidence of a custom will not be received to change or alter the clear and plain written and contractual expression of the parties to a contract. The contract provides that the clay is to be delivered ex ship Seattle, and that the purchaser is to take delivery of China clay from alongside vessel at once on discharge at Seattle, Washington. This defendant in error is *sui juris* and is competent to make any contract which it sees fit, and if in this contract they agree, according to the

reasonable, usual and intended interpretation of the words, to take delivery at a certain place, then they are bound by that contract. Defendant in error seeks to introduce evidence to show an alleged custom as to the interpretation of the word "delivery." We are of the impression that the word "delivery" has an unambiguous meaning both in its ordinary and legal sense, and that the word "delivery" was not inserted in the contract in contemplation of any unknown or unusual interpretation or custom which prevailed in the Port of Seattle in respect to it. It must be remembered that this contract was entered into between a partnership doing business in Liverpool, San Francisco and Portland, by and through its Portland manager, Mr. Tucker, contemplating a delivery of the clay in Seattle to a corporation having its place of business at Everett, Washington. Can it be said with any reasonableness that this contract was entered into and the word "delivery" inserted therein by and between parties neither of whom were residents of Seattle in relation to any custom which might exist in the Port of Seattle. We submit that the contract was not so entered into, and that any evidence relative to the custom of the Port of Seattle in the interpretation of the word "delivery" as applied to the China clay trade is wholly incompetent and irrelevant, and has no place in this case.

In support of our contention that evidence will not be received of an alleged custom or usage to vary the express and unambiguous terms of a written contract, we would refer the Court to the case of Williams v. Ninemire, 63 Pac. (Wash.) 534, where it is said:

"Here is an expressed contract, according to the claim "of both sides, as to the place where the fat cattle were "to be delivered. While one of them claims the delivery "was to be at London and the other at Montasano, yet both "alike admitted that the place of delivery was a subject of "express agreement between them. 'If parties make a "special contract in relation to a matter which would other- "wise be determined by usage, it follows that they meant "to exclude the application of usage, since otherwise they "would not make a special contract therefor. Whenever "it appears that an agreement has been made upon a par- "ticular point and the controversy is as to the terms of "that agreement, such terms cannot be changed by proof "of usage respecting them; in other words, the special "agreement excludes the usage.' (Citation of authori- "ties.) It is only where a contract is silent in some par- "ticular, or is ambiguous, that proof of custom is admis- "sible, and such proof is then admissible only for the pur- "pose of finding out what the contract really was and not "to overthrow it. Proof of custom is received in some cases "upon the assumption that as to those matters not covered "by express stipulations in the agreement, the parties are "presumed to have made their contract with respect to the "established custom and usage of that place; and these the "law will incorporate into the contract in order to explain "or complete it."

We would also cite the Washington case of Swadling v. Barreson, 59 Pac. (Wash.) 506:

"This question is based upon a specific contract. It "is specifically alleged that the contract was that commis- "sions should be paid when the contract was accepted by "the transportation company, but this claim cannot be "bound by any custom in relation to the payment of com- "missions. * * * * Certainly if this had been the real "contract the defendants could not have been bound by "any custom in relation to the payment of marine com-

"mission, if the custom proven had been to the effect that "the commission was due when the contract was entered "into. Neither could the plaintiff be bound by any custom "shown which was in opposition to this alleged contract, so "that the custom, if any existed, was absolutely immaterial "under the theory announced by both the plaintiff and the "defendants in their respective pleadings."

See also the case of Volrath v. Crow, decided by the Supreme Court of the State of Washington, and reported in 37 Pac. Rep., at page 472.

We would also respectfully refer the Court to the case of Hearns v. Marine Insurance Co., 20 Wallace (U. S. Supreme Court) 488, at page 492, where Justice Swayne says:

"Usage is admissible to explain an ambiguity, but it is "never received to contradict what is plain in a written "contract. If the words employed have an established "legal meaning, parol evidence that the parties intended "to use them in a different sense will be rejected, unless "if interpreted according to the legal acceptance they "would be insensible with reference to the context or to "the extrinsic facts. If no such consequence is involved, "proof of usage is wholly inadmissible to contradict or in "any wise to vary their effect. In no case can it be received "where it is inconsistent with, or repugnant to, the con- "tract. Otherwise it would not explain, but contradict "and change the contract which the parties have made, sub- "stituting for it another and a different one which they "did not make. To establish such inconsistency it is not "necessary that it should be excluded in express terms. It "is sufficient if it appears that the parties intended to be "governed by what is written and not by anything else."

It was said in the case of Moran v. Prather, 23 Wallace (U. S. Supreme Court) 492, at page 503:

"Usage cannot be incorporated into a contract which "is inconsistent with the terms of the contract; or, in other "words, where the terms of the contract are plain, usage "cannot be permitted to affect materially the construction "to be placed upon it; but when the terms are ambiguous, "usage may influence the judgment of the Court in ascer- "taining what the parties really meant when they employed "those terms."

We take the following observations from the case of Bliven et al. v. New England Screw Company, 23 Howard (U. S. Supreme Court) 420, at page 431:

"But parol evidence of custom and usage is not admit- "ted to contradict or vary express stipulations or pro- "visions restricting or enlarging the exercise and enjoy- "ment of the customary right. Omissions may be supplied "in some cases by the construction of the custom, but the "custom cannot prevail over or nullify the express pro- "visions and stipulations of the contract. 2 Add. on Con. "970. Proof of usage, says Mr. Greenleaf, is admitted either "to interpret either the language of the contract or to sus- "tain the nature and extent of the contract in the absence "of express stipulation and where the meaning is equivocal "or obscure."

Under the authority of these cases, three decided by the Supreme Court of the State of Washington, and three decided by the Supreme Court of the United States, we believe the trial Court committed error in receiving the evidence of Mr. Baillie to the effect that custom or usage in the Port of Seattle varied and changed the clear and plain meaning of the words used by the parties to the contract. These cases can be multiplied without end, but we believe the citations given and the authority thereof are sufficient to show the error of the lower Court.

SPECIFICATIONS OF ERROR EIGHT AND TWELVE

All that has been said relative to specification of error 7 applies with equal force to specifications of error 8 and 12, for the testimony of the witnesses A. H. P. Jordan (transcript of record, page 61) and William Howarth (transcript of record, page 63) was practically the same as that given by Mr. Baillie, and sought to explain the custom of the Port of Seattle in relation to the word "delivery" as used in the contract. The additional argument may be made against the admission of the testimony of these gentlemen, inasmuch as they testified as to a custom which existed in relation to the conduct of their own business in their own factory, and did not attempt to make the custom a general one existing in the Port of Seattle.

SPECIFICATION OF ERROR THIRTEEN

Specification of error 13 is as follows:

"That the said Court erred in overruling and denying "the motion made by counsel for plaintiffs in error at the "close of the testimony for judgment on the pleadings, "and also for verdict and judgment upon the case upon "the following grounds:

"1. That the defendant had pleaded in its answer and "its evidence proved that it had accepted 861 casks of the "clay, which conformed to the sample submitted, and that "it had rejected 739 casks, which were alleged to be inferior "to the said sample. That under the pleadings and the "evidence and where a contract for the sale of personal "property is entire the defendant will not be allowed to "accept performance of a part of said contract and reject "performance of another part.

"2. That under and by the pleadings the defendant has "not counter-claimed for any damages sustained by reason

"of the alleged breach of warranty, and hence none can be "allowed to it."

Without in any way whatsoever detracting from the earnestness with which we have urged our other specifications of error, we desire to submit that the most grievous and serious error committed by the Court was in overruling the motion above set forth. We wish to discuss this specification of error at greater length than have we the others, and to cite more authorities, for the points presented here raise a question of law which has been passed upon by various supreme courts, and we submit that the adjudicated cases show that we are correct in our position upon this appeal, and that the trial Court committed a reversible error. To make our argument clearly understandable we wish to refer to the complaint filed in this case (transcript of record, page 2) wherein, after the formal allegations, the plaintiffs in error say that on the 15th day of October, 1906, plaintiffs and defendant entered into a certain contract in writing wherein the plaintiffs agreed to sell and the defendant agreed to accept 300 to 400 tons of China clay of the brand known as P. X. Y.; the contract further providing that delivery was to be taken by the purchaser ex ship and from alongside vessel at once on discharge at Seattle, Washington, such clay to be at the risk of purchasers, and wharfage, if any, at Seattle, Washington, to be for the account of the purchaser. That under and by the terms of the contract the plaintiffs shipped 400 tons of China clay, which was discharged at the dock of Galbraith-Bacon Company at Seattle, and that the defendant, pursuant to the contract, took delivery from alongside said ship and ex said ship at Seattle. Where-

fore, plaintiffs demanded judgment for the purchase price. Thereafter the defendant, Everett Pulp & Paper Company, filed an answer denying the material allegations of the complaint, and for a further answer alleged that on the 11th day of October the defendant purchased 300 to 400 tons of P. X. Y. China clay ex ship at Seattle, Washington. That said clay was discharged at the Galbraith-Bacon dock and forwarded by the defendant in error to Everett, Washington, where, upon inspection, it was found that 861 casks conformed to sample of P. X. Y. brand, and that 739 casks were of an entirely different brand, and inferior to the sample submitted. That immediately upon the discovery that there was included in the said shipment of clay casks of a different and inferior quality *the defendant notified the plaintiffs and refused to accept the shipment.* By paragraphs V and VI of the further answer the defendant in error alleged that it rejected the 739 casks inferior to sample, and was ready and willing to return the same to the wharf in the City of Seattle, and that they accepted 861 casks, for which they tendered payment. A reply was filed denying the material allegations of the answer.

We desire to divide the argument under this specification of error into the following sub-headings:

1. Judicial interpretation of the words "ex ship" and discussion of the place of delivery.

2. Where a contract is entire and delivery has been made a vendee will not be allowed to accept a part of the goods delivered in performance of the contract and reject a part, but on the contrary, the whole must be accepted or the whole rejected.

3. Where goods are rejected under a contract, or there is an attempt at rescission of the contract, a subsequent retention of the goods and their use implies a waiver of the rejection or rescission, and the law presumes an acceptance of the goods furnished under the contract.

4. Under the pleadings in this case defendant is entitled to nothing by way of counter-claim or recoupment.

Taking up our subdivisions in the order named, we have:

1. Judicial Interpretation of the Words "Ex Ship," and Discussion of the Place of Delivery.

The written contract between these litigants called for delivery of clay from alongside said ship and "ex ship" at Seattle, Washington. We have searched the books carefully for the interpretation of the words "ex ship," and we cite the only two cases we have found to this honorable Court.

In the case of Harrison v. Fortlage, 16 Supreme Court Rep. 488, 161 U. S. 57, there was a contract between plaintiff and defendant calling for a shipment of sugar from the Philippines to Philadelphia, price per ton ex ship. The Court said, speaking through Justice Gray:

"The words 'ex ship' are not restricted to any particu-
"lar ship and by the usage of merchants, as shown in this
"case, simply denoted that the property in the goods so
"passed to the buyer upon their leaving the ship's tackle,
"and that he shall be liable for all subsequent charges of
"landing. They do not constitute a condition of the contract,
"but are inserted for the benefit of the seller." The Court

cited the case of Neill v. Whitworth, 18 B. C. (N. S.) 435, which case we have had no opportunity to examine.

The second of the cases interpreting this expression is the case of Tinsley v. Weidinger, 8 N. Y. Supp., page 476, wherein there was a bill of sale of 500 to 600 tons kainit, in blank * * * * delivered ex vessel in New York harbor. The Court, in its opinion, said:

"In the case at bar the contract provides that the kainit "shall be 'delivered ex vessel in New York harbor.' I see "no other possible way of construing this contract than to "hold that it was made an integral part thereof that the "merchandise shall be delivered, not in Germany, but at "New York. (In commenting on the case of Heller v. Man- "ufacturing Company, 39 Hun, 547, the Court continued.) "In the Heller case the word 'delivery' is used in two differ- "ent significations—a legal sense and a colloquial sense. "In one case it stands for assumption of legal control, in "the other for the beginning of physical possession. But "inspection of the whole instrument in the Heller case "shows the intent to deliver, in the legal sense of the word, "in the port in Germany. A similar inspection of the "entire contract in the case at bar discloses an intention "that 'delivery' in the legal sense and in the popular sense "of transfer of physical possession should be simultaneous "and should both take place at the Port of New York. "This obvious meaning of the language is further borne "out by the clause that 'buyers shall furnish vessel at New "York to carry the goods to Richmond.' Evidently the "intention was that the vendor was to deliver the goods in "New York and that there, although they had not arrived "at their ultimate destination, the vendee was to accept "them and assume all further charge and risk."

Passing on to the allied question under this point, as to the place of delivery, we respectfully refer the Court to

the case of Lawder & Sons Co. v. Mackie Grocer Co., 54 Atl. at page 634, wherein we quote the syllabus of the Court, where it is said:

"Where a contract of sale, in terms free from doubt, "prescribes the place of delivery of the goods it must gov- "ern the rights of the parties and collateral circumstances "will not be considered to arrive at a different construc- "tion."

In the case of Altman et al. v. Nilson, 84 N. W. (Iowa) 692, the question of delivery was discussed by the Court in the following language:

"The facts which we have set out above are undisputed, "and based upon them the defendant urges that the sale "was not completed because no acceptance of the order is "shown, and, further, because there was no delivery of the "machines to him. There was no provision in the contract "requiring any action on the part of the plaintiff to make "the transaction a completed sale, and upon delivery of "the machines to the defendant it was completed, so that "a rescission could not be made—if, indeed, it could have "been made at any time after the contract was signed. "That there was a sufficient delivery in this case we do "not doubt. It was clearly the intention of the parties "that the title should pass at the time, and in pursuance "of such intention the defendant immediately exercised "ownership thereover by his arrangement with Mr. "McKinley. This, under the circumstances, constituted a "complete delivery and acceptance of the machines. Brown "v. Wade, 42 Iowa 650; Barrows v. Harrison, 12 Iowa "588; 21 Am. & Eng. Enc. Law 550, 553, and cases cited."

We ask the particular attention of the court to the applicability of the just cited cases to the one at bar. Under the terms of the contract here the parties voluntarily named the place where delivery should be made imme-

diately ex ship and from alongside vessel. The Everett Pulp & Paper Company, in pursuance of the contract, not only took delivery at the place so designated in the contract, but exercised absolute ownership and control over the goods so accepted by them and sent them to another town, namely, Everett, Washington, where their manufacturing plant was situated and thirty miles from the place of delivery. We submit that this constituted an acceptance of the goods under the contract. For supposing the goods, in the course of trans-shipment from Seattle to Everett, were lost through a train or shipwreck, there could be no question but what the Everett Pulp & Paper Company had accepted delivery of the goods so as to make them liable for the entire purchase price. We submit that contracting parties may nominate a place where delivery is to be made, and that if delivery is made at that place the conditions of the contract have been fulfilled.

We also refer this honorable Court to the case of Houdelette v. Dewey, 86 N. E. 790, where the Court said:

"The plaintiff engaged to import the beams and deliver "them to the New England Structural Company, by whom, "under separate contract with him, they were to be wrought "into the desired shape. But in fact their works were at "Everett, and as the company refused to accept the deliv- "ery of the beams at the wharf the plaintiff, having paid "for transportation to the works for all the shipment, "demanded reimbursement. The defendant's agreement "with the company does not appear, nor is it important, "but upon recurrence to the contract the plaintiff became "bound to deliver only 'at Boston,' the place designated "by the buyer, and when the beams were landed on the "wharf and the company notified, they had performed their

"contract and the title then passed to him." Citation of authorities.

See also the case of White v. Harvey, 27 Atl. (Maine) 106, where the Court made the following comment:

"But to return to the question of acceptance before "suit brought. It is a general principle affecting this "subject that whenever personal property is sold, deliver- "able to a particular person or at a particular place for "the buyer, a delivery to such person or at such place is "a completed delivery to the vendee. 'The cases are numer- "ous,' said Whitman, C. J., 'which show that a delivery of "an article sold to a person appointed by the vendee to "receive it is a delivery to the vendee.' Wing v. Clark, 24 "Me. 366. The same rule attaches where the delivery is to "be at an agreed place. Means v. Williamson, 37 Me. 556. "The precise rule, as stated in several cases in Massachu- "setts, is that 'in an action for goods sold and delivered, "if the plaintiff prove a delivery at the place agreed, and "that there remained nothing further for him to do, he "need not show an acceptance by the defendant.' Nichols "v. Morse, 100 Mass. 523; Brewer v. Railroad Co., 104 "Mass. 593; Rodman v. Guilford, 112 Mass. 405. Discus- "sion in other cases serve to illustrate this rule." Citation of authorities.

"The delivery at a place agreed is for the buyer's accom- "modation. Instead of his taking the goods they are sent "to him at his direction. Then the seller's responsibility "is ended, and an acceptance is implied. The buyer, in "effect, agrees that such delivery shall operate as a com- "plete transfer of the property."

See also 35 Cyc. 187 and cases there cited.

The change of possession also constitutes acceptance of delivery.

84 N. W. 692.
35 Cyc. 504.

2. Where a Contract is Entire, and Delivery Has Been Made, a Vendee Will Not be Allowed to Accept a Part of the Goods Delivered in Performance of the Contract and Reject a Part, but on the Contrary the Whole Must be Accepted or the Whole Rejected.

We believe that the authorities cited under this subheading are so clear and convincing as sustaining the proposition of law which we herein set forth that the error of the trial Court will be manifest. The defendant in error will be bound by its pleading, and for the purpose of the argument hereunder we will briefly set forth the sense of the answer filed.

By the further answer and defense (transcript of record, pages 7, 8 and 9) the defendant in error admitted the execution of the contract and that 400 tons of China clay were delivered on the Galbraith-Bacon dock at Seattle. That the clay was there accepted and transported to the defendant's plant at Everett, Washington, where upon an examination 861 casks conformed to sample and 739 casks did not. By paragraph II of the further answer (transcript of record, page 8) the defendant in error pleaded that immediately upon the discovery that the clay was a different brand the plaintiffs were so notified and the *defendant refused to accept the shipment. Thereafter the defendant accepted a portion of the shipment, for which it tendered payment and rejected 606 casks which were claimed to be inferior to the sample.* Such a mode of procedure as adopted by the defendant in error will not be countenanced in the law, for where a contract is entire, incapable of division into its various elements and a consideration set forth for each element, acceptance must be of the whole or rejection must be of the whole. One will

not be allowed to accept that portion of the contract which is pleasing to him (the consideration of the contract being entire and going to the whole contract) and reject another portion which is displeasing. The defendant, by paragraph II of the further answer, pleads *that it rejected the entire shipment, and then subsequently by paragraphs III, IV and V of the further answer, that it accepted a portion of the clay and rejected a portion.* There is nothing in this record to show that such a procedure was ever acquiesced in by the plaintiffs in error, but on the contrary, we find upon examination of defendant's exhibit No. "5" (transcript of record, page 39), which is a letter written by the plaintiffs in error to the defendant in error, that the plaintiffs in error insisted at that time that the defendant in error must pay for the entire shipment as the same had been received and accepted by it. There is no subsequent agreement shown or attempted to be shown wherein the plaintiffs in error allowed the defendant in error to use that portion of the shipment which they pleased and to throw out the rest.

The question presented here has been settled by the Supreme Court of the State of Washington, wherein this trial Court is situated, in the case of Buckeye Buggy Co. v. Montana Stables, 43 Wash. 49 (1906), 85 Pac. 1077, and 17 American State Rep. 1032, wherein the Buckeye Buggy Company of Ohio sold to the Montana Stables of Seattle a brougham for $900 and a coach for $700. Thereafter the two vehicles were shipped to Seattle, when the Montana Stables accepted the coach but rejected the brougham, alleging that the same did not conform to the specifica-

tions. The Court, in speaking upon the question under consideration, said:

"If the contract in suit was entire, and parol testi-"mony incompetent to explain the consideration, the judg-"ment must be affirmed, as an acceptance of one vehicle "would in law be equivalent to the acceptance of both. If, "on the other hand, it was competent for the appellant to "show that the contract was in fact severable, the judg-"ment must be reversed, as a sufficient deviation from the "written contract was alleged to warrant the appellant in "refusing to accept the brougham. *We believe it to be a "rule that, if several articles are sold for a single and "entire consideration, without any apportionment of the "purchase price as between the several articles, the con-"tract of sale is entire and cannot be severed, except by "agreement of the parties.*"

The Court then reviews the authorities to sustain this proposition.

We believe this case to sustain the proposition for which we are contending; and that inasmuch as it cannot be claimed that the contract in the case at bar was severable and the consideration capable of being apportioned to each cask of clay, the case cited is controlling in this instance.

We desire to cite the case of Manss-Bruning Shoe Mfg. Co. v. Prince, 41 S. E. (West Virginia, 1902) 907. We ask the indulgence of the Court in citing this case at length, for the questions there raised and decided are analogous to those at bar. In this case the plaintiff, the shoe manufacturing company, entered into a contract with Prince, the defendant, to manufacture a certain lot of shoes to be delivered by March 15th. The shoes were not delivered until April, but when they were so delivered the

defendant took the shoes to his store, and then on April 15th wrote declining to accept the shoes and informed the plaintiff that the shoes were held for its order. Thereafter Prince opened the shoes and selected therefrom those shoes which he was willing to take and rejected the balance. The shoe manufacturing company did not accept such new arrangement, but brought an action for the entire purchase price. We quote at length from the opinion of the Court, for the reasoning and the authorities are peculiarly applicable to the case at bar.

"The shoe company did not indicate any willingness "for Prince to keep part of the goods. Common sense, "common justice, say that he could not keep part of the "goods without the seller's consent. This letter shows that "Prince knew this. On May 6th, Prince again wrote the "shoe company, stating that he had written it on 26th "April that the shoes were behind time and not up to "sample; but he kept the goods in his store fourteen days "after taking from the depot. Did he expect some abate- "ment in price, or that he would be allowed to keep part "of the goods? Why not ship back? On 8th May the shoe "company wrote him in reply that the company had writ- "ten him, explaining delay in shipment; that he was to "notify them when to go to work on the shoes, and insist- "ing that the shoes were even better than the samples, and "that the agent would soon see him and explain matters "more fully; *but it neither agreed to take the goods back, "nor allowed him to keep only a part of them. What did "he do on receipt of that letter? Did he return the goods "as received? Not at all. His own evidence says, 'After "receiving that letter I looked over the goods, and kept "just as many as I could use, and sent the rest back.' This "decides the case for the plaintiff. A purchaser saying he "countermands an order, yet taking possession of the goods, "selecting a part to keep, a part to return. A purchaser "who says the delivery is too late, yet does these things. A*

"purchaser who says some of the goods are inferior sends "back the inferior part and keeps the part up to sample, "as he himself admits he did do. The positions are utterly "inconsistent, unjust, and therefore not allowed by law. "Prince put, as he admits, $130 worth of the goods out of "$473.50, the total value of them, upon his shelves, and "sold them. Where did he get the right to do this? Not "from the plaintiff. *Receipt of goods by a buyer will be "a binding acceptance 'if any act be done by the buyer "which he would have no right to do unless he were owner "of the goods.'* Benj. Sales, 521. 'The buyer will also lose "his right of returning the goods delivered to him under a "warranty of quality if he has shown by his conduct an "acceptance of them, or if he has retained them a longer "time than was reasonable for trial, or has consumed more "than was necessary for testing them, or has exercised own-"ership, as by offering to resell them.' Here Prince sold "part of the goods as his own. *Ratification of a part of a "contract is ratification of the whole.* 7 Am. & Eng. Enc. "Law (2nd Ed.) 144. In Maynard v. Render, 23 S. E. "194, the Supreme Court of Georgia puts clear law in say-"ing, 'They could have repudiated the entire agreement "and rejected the whole (cordwood sold); but, having "elected to accept a portion, they are bound by their elec-"tion and must receive all.' Tiff. Sales, 111, says: 'If the "party has enjoyed part of the consideration there can be "no rescission;' and, 'If the failure is merely as to quality "of a part of the goods, the buyer cannot rescind unless "he rescinds in toto.' Clark, Cont. 350, says: 'The con-"tract must be rescinded in toto. It cannot be rescinded "in part.' Our own case of Thompson v. Douglass, 35 W. "Va. 337, 13 S. E. 1015, shows that acts of ownership over "property by a purchaser bind him to a contract. 'If one "with knowledge of a fraud which would relieve him from "a contract goes on to execute it he thereby confirms it, "and cannot get relief against it. He has but one elec-"tion—to confirm or repudiate the contract; and, if he "elects to confirm it, he is finally bound by it.' Hutton

"v. Dewing, 42 W. Va. 691, 26 S. E. 197. So here. *"Prince knew of his letter of countermand, of the late-"ness of delivery, and of the quality of goods; and he "could not, without binding himself irrevocably for the "price of the goods, take them from the depot, open them, "and much less keep part.* When Prince took part of the "shoes out of the lot to keep he knew that the shoe com-"pany would hold him to his contract, because he says that "when he had its letter of 8th May telling him so. He did "this with his eyes open to its claim to hold him to his "contract. How can he talk about inferiority of the goods "when, for instance, as he admits under oath, out of a lot "of six pairs of fine shoes he kept one for his own wear "and sent the remaining five pairs back? They were of the "same quality.

"Under these principles, the Court erred in giving the "instruction asked by defendant, that 'the fact that the "firm of Ash M. Prince retained and kept a part of the "shoes referred to in this case does not of itself constitute "an acceptance of the shoes returned by him.' For the "same reasons, it was error to refuse the six instructions "asked by plaintiff. They are somewhat repetitions, but "put the law properly. *They are, in effect, that if the "shoes were received by Prince and taken to his store, and "Prince accepted the shoes, or any part of them, and kept "such part, or did any act as to such part as the owner "thereof, the firm was liable for the whole price.* It was "error not to exclude from the consideration of the jury "all evidence of Prince and Noble as to the countermand "of the order, and as to date of delivery as too late for "spring trade, and of the quality of the goods. It is proper "to add that this case does not in the least, as to matters "above considered, depend on conflicting evidence or weight "of evidence, or its effect or credibility. The facts above "stated are not contested. I have not considered anything "as to which conflict of evidence exists. In fact there is "no conflict of any import. This being so, the Court does "not invade the province of a jury, but holds that upon

"the undisputed, fixed facts the verdict is contrary to the "law arising on those facts. This is very different from "the case where the Court has to find facts on evidence, or "on conflict of evidence, differently from the jury. A Court "must set aside a verdict contrary to law on fixed facts. "Miller v. White, 46 W. Va. 68, 33 S. E. 332, 76 Am. St. "Rep. 791; Grayson's Case, 6 Grat. 712."

We cannot pass without calling to this honorable Court how strangely analogous are the facts of the case just cited and the case at bar and the sane and sound reasoning of the Court in arriving at the conclusion that the plaintiff manufacturing company was entitled to recover the entire consideration of the contract. We quote from the opinion rendered in the case at bar by the trial judge in the lower Court, where he says: "On the contrary, it (the defendant "in error) was prompt in giving notice to the plaintiff of "the inferior quality of the clay and has acted fairly "toward them in minimizing the loss by making use of and "tendering payment for all of the clay fit for use and by "holding the rejected portion subject to plaintiffs' right to "dispose of it. The plaintiffs' contention is founded upon "the false idea that the defendant was legally bound to "either accept the commodity of which delivery was "tendered and pay the contract price for all of it, regard- "less of its quality, or else refuse to receive possession of "it. This idea is contrary to the rule of law applicable to "the case, because it ignores the implied warranty upon "which the defendant had a right to rely."

The opinion of the trial judge is directly opposed to the opinion just cited of the Superior Court of West Virginia, and we submit that the contention of the plaintiffs in error is not based upon a "false idea," as classified by the

trial judge. The defendant in error accepted delivery of the clay at the wharf, and at the place nominated for delivery in the contract, assumed undisputed ownership by shiping the same to its plant at Everett, Washington (admitted by its answer), and the further undisputed evidence shows that it used about one-half of it. We cannot understand any reasoning other than that this was an acceptance of the performance of the contract on the part of the defendant in error, and if the plaintiffs in error did not provide clay of the P. X. Y. brand the defendant in error had the right to counter-claim for the damages by a formal pleading on the breach of the warranty, a thing which it did not do.

In the case of Avery Mfg. Co. v. Emsweller, 67 N. E. (Ind. 1903) 946, the defendant purchased threshing machinery, and he took delivery at the place named in the written contract. He afterwards removed one part of the machinery, leaving the remainder where he had accepted delivery. The Court held that an acceptance of one portion of the outfit purchased was acceptance of the whole, and entitled the seller to the entire purchase price.

In the case of Crane Co. v. Columbus Construction Co., 73 Fed. 984 (1896), without attempting to cite the facts we give this extract from the opinion of the Court:

"It is not a case of rescission. That requires the plac-
"ing of both parties in *statu quo*. * * * * But upon the
"hypothesis of the proposed instruction, which, together
"with the evidence offered in support of it, ought, as we
"think, to have been submitted to the jury, it is simply a
"case where, under a contract of sale which is executory
"and entire, the vendee repudiates the contract in respect
"to a part of the goods, and in respect to the remainder

"seeks to enforce it—a proposition which, we think, is sup-
"ported neither by reason nor precedent."

The Federal Court then reviews the authorities which clearly sustain the rule of law, as announced by the Court.

In the case of Reynolds v. Palmer, 21 Fed. Rep., page 433, the Court held that where a contract is rescinded it must be rescinded as to the whole subject matter and the parties placed in *statu quo,* and that a vendee will not be allowed to accept a portion of the goods under an entire contract and reject a portion.

In the case of Lyon v. Bertram, 20 Howard (U.S.), page 149, there was a sale of a cargo of flour at a fixed price per barrel. The Court held that where a contract is to be rescinded at all it must be rescinded in toto and the parties put in *statu quo.* And, further, that the purchaser cannot rescind the contract as to a portion thereof and accept as to another portion. "It cannot be rescinded in "part and enforced in part."

In the case of Morse v. Brackett, 98 Mass. 205, the plaintiff was a wool factor and had in its store a separate lot of eight bags supposed by him to contain combings pulled wool, each of which was marked "Parsons," with a black line drawn about the word so as to enclose it within a parallelogram. The defendant, being a manufacturer, inquired for wool of this description and was sold these eight bags by plaintiff's salesman. Defendant purchased the eight bags, the entry on the charge being 'eight bales pure combings pulled wool.' When the bags were opened the defendant found that one of them contained only a very small portion of combings pulled wool. He

refused to receive the same and returned it to the plaintiff. The plaintiff asked for the instruction that the contract was an entire contract and that the defendant had no right to rescind it as to one bag and affirm it as to the others, but if he wished to avail himself of the defense set up he should have returned, or offered to return, the entire lot. The Court, speaking through Chief Justice Bigelow, said:

"This case comes within the former principle that no "contract can be rescinded unless both parties are restored "to the condition in which they were before the contract "was made. One party cannot insist on the validity of a "contract as to one portion of the subject matter and claim "to set it aside and avoid it as to the remainder. The ven- "dee of a specific quantity of merchandise sold under an "entire contract cannot retain a portion to his own use "and return the remainder to the vendor. If he receives "and holds a part he will be liable in assumpsit for the "whole. If, on the ground of fraud or breach of warranty "or for other reason, he seeks to rescind the contract he "must return the whole of the merchandise."

In the case of Clark v. Baker, 46 Mass. 452, the plaintiff purchased a cargo of corn from the defendant, agreeing to pay 76½ cents per bushel for the yellow corn and 72½ cents for the white corn, the defendant warranting it to be of a certain quality. The schooner went to plaintiff's wharf and the plaintiff received a part of the cargo and refused to receive the balance, stating that the corn did not conform to the warranty. The question arose as to whether or not the contract was entire or severable. We commend this case to the Court as a full treatise upon the law of entire and severable contracts. The Court held that the contract was entire and was incapable of division, and

that if the plaintiff accepted a portion he was then legally bound to accept the whole. How much stronger is the case at bar than the one just cited. The contract provided for the purchase of two different kinds of corn, the yellow kind at a certain price and the white kind at a different price. By a strained construction the Court could have found that the consideration for each kind of corn so purchased could be separated and made distinct from any other consideration therein named, and could have held the contract divisible on those grounds, and by virtue of which the plaintiff could have accepted a part and rejected a part. But this was not the conclusion of the Court, and we submit that the case at bar is much stronger inasmuch as one price was fixed for the entire shipment of clay, and we believe that no rule of law or adjudicated case will be found as authority for dividing the contract in the case at bar and allowing rejection of a part and acceptance of a part.

In the case of Sigerson v. Harker, 15 Mo. 70, the Court said that where a contract is entire it would be manifestly unjust for the vendee to select such as he supposed corresponded with the warranty and return the remainder.

The following cases also clearly enunciate the same rule:

Marvin v. Brewster Iron Mining Co., 56 N. Y. 671.
Junkins v. Simpson, 14 Maine 364.
Harzfeld v. Converse, 105 Ill. 534.
Kimball v. Lincoln, 7 Ill. App. 470.
Inwack v. Cruse, Wils. (Ind.) 320.
Miner v. Bradley, 39 Mass. 457.
Burnett v. Stanton, 2 Ala. 183.
35 Cyc. 139 and cases there cited.

See also the extended note upon this question to the case of Huyett & Smith Co. v. Chicago Edison Co., 59 American State Rep. 272, at page 277.

3. Where Goods are Rejected Under a Contract or there is an Attempt at Recission of the Contract, a Subsequent Retention of the Goods and Their Use Implies a Waiver of the Rejection or Recission, and the Law Presumes an Acceptance of the Goods Furnished Under the Contract.

We believe that the above is a statement of the law which is not only borne out by adjudicated cases but by common sense reasonably applicable to mercantile transactions. If, after a vendee accepts delivery of chattels under a contract and thereafter attempts to rescind the entire contract and then later uses the goods, or a portion thereof, it is reasonable to believe that the vendee has reconsidered the attempted rescission and then takes acceptance of the goods, and that the former position of rescission is abandoned and no longer relied upon. This ought to be a rule of law applicable to business transactions, and we believe the same to be recognized by the books.

In the case of Dodsworth v. Hercules Iron Works, 66 Fed. Rep. 483, the Court said:

"The right of rejection was lost by the long continued "use of the machine, which was entirely inconsistent with "the purpose to resort to the first remedy which was open "to them and consistent only with a claim of title and "ownership." Citation of authorities.

In the case of Gale Sulky-Harrow Mfg. Co. v. Moore, 26 Pac. (Kans.) 703, there was a contract with a warranty for the sale of a farming implement. The implement was

delivered and plaintiff rejected it, saying it did not conform to the warranty. However, he used it for a part of his farm work. The Court said:

"If Moore decided to rescind, it was his duty to place "plaintiff in *statu quo* as nearly as possible, and therefore "he should have returned, or offered to return, the imple- "ment unless it was wholly worthless to both parties. From "the testimony it cannot be said that it was valueless, and "neither could it be said that there was a rescission. In "order, however, that the purchaser be entitled to rescind "the contract he must return the property, or offer to "return it, within a reasonable time. He cannot retain "and use the property and at the same time state he repu- "diates and rescinds the contract of purchase."

In the case of Buckstaff v. Russell, 79 Fed. 611, suit was instituted by the plaintiff to recover the price of certain machinery sold to the defendants under a contract with a warranty. After delivery of the machinery the defendants notified the plaintiff that they refused to accept the same, but later made use of the machinery. The Court held that the attempted rescission was not available to the defendants inasmuch as the machinery was used after the rescission, and that the attempted rescission would be presumed to have been abandoned, and the defendants accepted the same in compliance with the contract.

In the case of Brown v. Foster, 15 N. E. 608, there was a contract with a warranty for the sale of machinery. After the machinery was delivered defendant notified the plaintiff that he rejected the same, but thereafter used the machinery in his business. The Court said:

"Non-payment after the performance of the vendor "was a breach of the vendee's agreement, and upon that

"the action was well brought. It is true the vendee said, " 'I will not accept,' but this was of no consequence after an "opportunity to inspect and with full knowledge of its "quality, he still not only retained the machinery but "enjoyed the benefits of its use. That act was one of own- "ership and completed the transaction, and the transmuta- "tion of property from the vendor to the vendee was final. "The contract then became the only measure of the defend- "ant's right or the plaintiff's liability."

We have no desire to weary the Court by amplifying at length the authorities already cited herein, but will simply refer to the cases that have adjudicated this point, so that this honorable Court may consult the same if it so desires.

Hallwood Cash Register Co. v. Berry, 80 S. W. (Tex.) 857, and cases therein cited.
Libby v. Haley, 39 Atl. 1004.
Lenz v. Balke, 44 Or. 569.
Tiedman on Sales, Sec. 197.
Drake v. Sears, 8 Or. 209.
Schumann v. Wager, 36 Or. 65.
Dean Pump Works v. Astoria Iron Works, 40 Or. 83.
Leggett & Myers Tobacco Co. v. Collier, 56 N. W. (Iowa) 417.
Eagle Iron Works v. Des Moines Suburban Railway Co., 70 N. W. (Iowa) 193.
Detroit Heating and Lighting Co., v. Stevens, 52 Pac. (Utah) 379.

4. Under the Pleadings in This Case Defendant is Entitled to Nothing By Way Of Counter-claim or Recoupment.

The question presented under this sub-heading is one of pleading. We would again respectfully refer this Court to the further answer and defense of the defendant in

error (transcript of record, pages 7, 8 and 9). We submit that when chattels are sold under a warranty and the delivered article does not fulfill the warranty, the vendee has an election of remedies as follows:

1. To rescind the contract in toto, if it be entire, for failure of consideration.

2. If the purchase price has been paid, to sue the vendor for damages arising from the breach of the warranty.

3. If the vendee is sued by the vendor for the purchase price, to set up the warranty and the breach thereof and *counter-claim* for the damage sustained.

None of these things were done by the defendant in error, and the only course open to it, under the rule of pleading and law, was to set up a counter-claim for the damages sustained by it because of the non-compliance of the delivered clay with the warranted quality. Defendant in error has not counter-claimed for the damages, as even a hasty reading of the further answer will show, but has merely set up the breach of the warranty and a partial rescission of the contract as a defense. The defendant in error has claimed no damages, has not asked for any, and we submit, under the pleadings herein, none can be allowed to it. If the defendant had counter-claimed for the damages it sustained, and properly pleaded such counter-claim, and properly alleged its damages, then an issue would have been presented in this case, as to the amount of the damages, but no such pleading was adopted by the defendant in error and no such issue was raised or presented therein. We, therefore, submit that the trial Court committed an error when it awarded damages to the defendant in error, there being no issue upon which to make such a finding.

We would call the particular attention of the Court to the case of Nash v. Weidenfeld et al., 58 N. Y. Supp. 609, at page 611, where it is said:

"But the contract contains a warranty that the prop-
"erty delivered shall be of a certain quality, and where
"such a contract is made the right to recover damages for
"a breach of it survives the acceptance of the property.
"Such a right, however, is not a defense to the action after
"acceptance of the goods, but is a counter-claim for the
"breach of the contract of warranty (Norton v. Dreyfuss,
"106 N. Y. 90, 12 N. E. 428); and, to enable the party com-
"plaining of it to recover upon it, it is necessary that he
"should allege not only the facts constituting the breach
"of the warranty, but also the fact that he has suffered
"damage on account of it. Nothing of that kind appears
"in this pleading. So far as can be inferred from it, it was
"not intended to be a counter-claim, but it is set up as a
"*'further defense,'* and there is in it no statement that the
"plaintiff has suffered any damages by reason of the failure
"of the Shelby Steel-Tube Company to perform its con-
"tract, and no claim for affirmative relief whatever. *But*
"where one is called upon to set up an answer which is
"available only as a counter-claim he is bound to plead it
"in explicit terms and not leave it to inference, whether he
"intends or not so to plead it (Rice v. Grange, 131, N. Y.
"149, 30 N. E. 46); and if he fails to plead it as it ought
"to be pleaded and the objection is properly taken at the
"trial, he cannot complain if the Court holds him to the
"pleading which he pretends to make.

"In any aspect of this case, the answer was entirely
"insufficient, even if it should be conceded that the defend-
"ants were in a situation to set up a defense against the
"plaintiff as the owner of this note."

The case just cited more clearly states the law applicable to the one at bar than we can hope to do, and sets forth our position, under this sub-heading and upon this

writ of error precisely as we wish it understood. In the spirit and language of the case just cited, even though the Everett Pulp & Paper Company had a right to counter-claim against Meyer, Wilson & Company for the damages it sustained by reason of the breach of warranty, yet that counter-claim must be pleaded with particularity and be specifically alleged, and a prayer must be attached asking for affirmative relief. None of these things were done in defendant's answer, but it says (transcript of record, page 7), *"and further answering the complaint and by way of "an affirmative defense, this defendant alleges."* And at the conclusion of its answer it tenders into Court payment for the clay which it accepted and asked that the action be dismissed without further costs to itself. We do not believe that in any sense of the word this "further answer "and defense" can be looked upon as a counter-claim, and if the Everett Pulp & Paper Company has not formally pleaded a counter-claim for damages then it is reasonable to believe that it has sustained none, and that it could prove none before a court of law. We submit to this Court that it did not prove any damages sustained by it on account of the breach of this warranty. But the whole gist of the defense goes to the fact that it accepted a part of the clay for which it tendered payment, and rejected a part, throwing it back on the hands of Meyer, Wilson & Company, and refused any payment whatsoever therefor, yet in the face of this pleading and in the entire absence of any evidence of damages the trial judge, in his opinion, says (transcript of record, page 24): "The measure of "damages which the vendee may claim for breach of an "implied warranty of quality is the difference between the

"actual value of the property delivered and the higher "value of the warranted quality. * * * * In this case "the defendant having offered to return the inferior clay "and to hold it subject to disposal by the plaintiffs, the "contract price is the measure of damages which it is "entitled to recoup." We must construe the opinion of the Court as findings of fact and findings of law in the absence of any others prepared and signed by the trial Court, and here is a finding of fact and a finding of law which is wholly unwarranted by any construction of the pleadings in this case or by any interpretation of the evidence herein. The trial Court has gone further than it had a right to do and has granted to the Everett Pulp & Paper Company a relief which it did not ask for and which it did not seek. The Everett Pulp & Paper Company and its counsel considered that as a matter of law it had a right to accept a portion of the clay and reject a portion of the clay received under an entire contract, and that it would only have to pay for that portion which it received and accepted and used, and that the rejected clay could be thrown back on the hands of Meyer, Wilson & Company, and they could make the best of it. This was its complete defense. It sought no affirmative relief, did not plead for affirmative relief, yet the trial Court saw fit to grant the relief by way of damages, damages which were unsought and unasked.

As further sustaining the rule of pleading, we cite Sloan Commission Co. v. Fry & Co., 95 N. W. (Neb. 1903) 862. The Court said:

"In a suit to recover the price of goods sold and deliv- "ered where the sale was induced by statements and repre-

"sentations amounting to a warranty as to the kind and "quality of the goods, the defendant may retain them, plead "the warranty, facts constituting a breach thereof and set "up a counter-claim for the amount of his damages, which "will be the difference between the real value of the goods "and what they would have been worth if they were of the "kind and quality and in the condition represented, or he "may rescind the sale, return, or offer to return, the goods "and plead such rescission and tender as a complete defense "to the action (citation of authorities). An examination "of the answer filed in the County Court and set forth "above clearly shows that it fell far short of stating a "defense to the cause of action set forth in the petition. "It contained no counter-claim for damages for a breach "of the warranty and no allegation that the plaintiff had "rescinded the sale by returning, or offering to return, the "coffee. Such an allegation was absolutely necessary. "Without it the answer stated no defense."

In the case of Harrigan et al. v. Advance Thresher Co., 81 S. W. (Kan. 1904) 261, at page 262, the Court said:

"There is a material distinction between a warranty of "a chattel and an executed sale and a warranty that "articles to be manufactured and delivered in the future "shall be of a particular quality. In the former case the "purchaser has a right to rely upon the warranty without "examination or inspection of the article, and, therefore, "may return the article or sue for the breach of the war- "ranty, *or use it as a defense by way of recoupment.* Upon "this authority and the other cases cited in the opinion, "this being an executed sale, the appellants had the right "to retain the engine and make defense by way of recoup- "ment."

See also the case of Browning v. McNear, 78 Pac. (Cal. 1904) 722.

Vol. 19 of Enc. of Pleadings and Practice, pages 11 and 12.

Peerless Reaper Co. v. Conway, 48 N. W. (Wis.) 854.
Underwood v. Wolf, 23 N. E. (Ill.), page 598.
Smith v. Mayer, 3 Colo. 207.

SPECIFICATION OF ERROR FOURTEEN

Specification of error 14 relates to the damages which the trial Court awarded to defendant in error. The trial Court, in its opinion, made this finding (transcript of record, page 24):

"The defendant acted within its legal right in taking "possession of the clay and resisting the plaintiffs' demand "for the price of the portion inferior to the sample. In "this country the rule is well established by numerous deci- "sions of the courts, that a breach of an implied warranty "of quality entitles the vendee to retain the goods, and "when sued for the purchase price to set up the breach of "the warranty to reduce the sum recoverable by the vendor. "The measure of damages which the vendee may claim for "breach of an implied warranty of quality is the difference "between the actual value of the property delivered and "the higher value of the warranted quality; and if there "is no other evidence of value the price agreed to be paid "will be regarded as the value of the property of the quality "warranted. In this case the defendant having offered to "return the inferior grade and to hold it subject to dispo- "sition by the plaintiffs, the contract price is the measure "of damages which it is entitled to recoup."

It is agreed by the parties to this action that the contract price of the clay was 70 cents per one hundred pounds, allegation of complaint (transcript of record, page 3), allegation of answer (transcript of record, page 7). We would now refer the Court to the testimony of Mr. W. J. Pilz, either the treasurer or bookkeeper of the Everett Pulp & Paper Company, which is set forth in the

transcript of record, page 46. Mr. Pilz testified that he sold a portion of the rejected clay, one lot for $17.00 a ton, another lot for $15.00 a ton, which selling price of the rejected clay was 85 cents per one hundred pounds, which was ten cents higher per one hundred pounds than the contract price. *Yet in the light of this testimony the Court said the measure of damages is the difference between the actual value of the property deliverd and the higher value of the warranted quality, and if there is no other evidence of value the agreed price will be the measure of damages.* The testimony of Mr. Pilz seems to have been entirely disregarded by the Court, for by the testimony of the witness of defendant in error, and no attempt is made to discredit it, the selling price of the rejected clay, after the same had remained exposed in the open and in the yard some time, was ten cents per one hundred pounds higher than the alleged contract price. Conceding, for the purpose of the argument under this specification of error, that the defendant could make a valid rejection of a portion of the property delivered under the entire contract, yet it has sustained no damages for the reason that the quality of the clay delivered and rejected could have been sold for a higher price than that which was paid for it. The defendant in error was bound, under the rule of law, to minimize the damages as far as possible, and if it had proceeded to sell all the clay upon the same basis of valuation as it sold a portion, to-wit: ten cents per one hundred pounds higher than the contract price, it would have made a profit on the pretended rejected portion of the clay, hence we are unable to understand the finding of the Court, as made in its opinion, that there was no value shown of

the rejected clay, and hence the measure of damages would be the contract price. If no other error had occurred in this record, we submit that this is sufficient to reverse the lower Court. For while the trial Court stated the rule of damages to be the difference between the property so delivered and the higher value of the warranted quality, which we believe to be a correct statement of the rule of law relative to damages, yet it disregards the evidence applicable to such rule and disregards the higher value of the clay which was pretended to be rejected, and as testified to by the witness of the defendant in error, and states the measure of damages is the contract price. We feel that such a finding is wholly inconsistent with the rule of law as relating to damages as announced by the Court and the evidence applicable thereto, and just cited.

CLOSING STATEMENT

We do not believe that we can amplify this brief so as to make our position any stronger than is as already set forth herein. We have not endeavored to burden the Court with written arguments sustaining our position, but on the contrary, have chosen to cite adjudicated cases and well considered opinions, to which we believe this Court will give more attention. We submit this brief in the belief that all the evidence has been fairly quoted and all cases cited bear directly upon the points involved. We submit to this honorable Court that upon the great strength of the authorities arrayed in this brief the trial Court committed error to the great harm of the plaintiffs in error.

It is most respectfully urged by plaintiffs in error that said judgment should be reversed, with directions to the

Court below that a judgment should be directed for plaintiffs in error.

Respectfully submitted.

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ARGUMENT